Supreme Court, U.S.
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NO. 85-1344

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1985

ROBERT JULIAN TAYLOR

Appellant,

v.

H. F. MOONEY, JR., as Superintendent of the West Virginia Department of Public Safety, and THE DEPARTMENT OF PUBLIC SAFETY BOARD OF APPEALS for the discharge of Robert Julian Taylor

Appellees.

ON APPEAL FROM THE
WEST VIRGINIA SUPREME COURT OF APPEALS

MOTION TO DISMISS OR AFFIRM

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STATEMENT OF THE CASE

A. Pertinent Facts Omitted by Appellant

Superintendent Mooney, as chief executive officer of the West Virginia State Police, was under a statutory duty to investigate alleged misconduct of state policemen. W. Va. Code § 15-2-21. Accordingly, upon receiving apparently reliable information that appellant may have been involved in the theft of four hand-held two-way radios, he ordered such an investigation on January 16, 1979. (Appellee's Exhibit No. 1, Tr. 62-63, 152-154) Lt. Fink was the investigating officer and a friend of appellant. He testified that he was initially biased in favor of appellant, Corporal Taylor. (Tr. 304- 305, 371, 442-443)

In the course of his four-day investigation, Lt. Fink learned that Corporal Taylor had, on several occasions, accompanied one Jerry Lee Fulks to a radio-technician's home where, in Corporal Taylor's presence, Fulks had sought to have the stolen radios modified to operate on law-enforcement frequencies. (Tr. 201-233) The radio technician told Lt. Fink that Corporal Taylor had made remarks which unequivocally demonstrated that Taylor knew the radios were stolen. (Tr. 204, 213-215) Taylor was at that time Commander of the Paden City detachment of the State police, which had participated in the investigation of the theft. (Tr. 142, 149-150, 478) (At the evidentiary hearing before the Board of Appeals, appellant denied any knowledge that the radios were stolen, and denied knowing

about the theft or the investigation thereof. The Appeals Board later found these denials to be incredulous.)

In the course of his investigation of Taylor's alleged involvement, Lt. Fink encountered appellant three times. During one such encounter, Lt. Fink advised appellant "essentially who had given statements implicating him and briefly what those statements alleged." (Tr. 374-375, 606-610) During the last encounter, Lt. Fink "outlined to Corporal Taylor the seriousness, in my judgment, of the situation he was in," and told him "the content of the investigation and the evidence." However, Lt. Fink did not accede to appellant's request to see the written statements of the witnesses Fink had interviewed. (Tr. 348-349) (The entire investigation report, including the statements, was

later furnished to appellant prior to his hearing before the Board of Appeals.) Lt. Fink did not interrogate Taylor, nor did Taylor volunteer any information other than to comment that he did not know what Lt. Fink was talking about. (Tr. 374-375, 606-610)

On January 15, 1979, Lt. Fink advised Corporal Taylor to report to Superintendent Mooney the following day. Taylor did so, accompanied by his attorney, whereupon the charges and the investigation were discussed "for a number of hours." (Tr. 87) At that meeting, Superintendent Mooney decided that he "had good and sufficient reasons under the General Orders of the Department to dismiss the Corporal * * *." (Tr. 65-66) Taylor then declined an option to resign, and was handed previously prepared documents effecting

his discharge and explaining the reasons therefor. (App. E; Appellee's Exhibit Nos. 2 and 3; Appellant's Ex. No. 1; Tr. 66-76) Appellant did not challenge the sufficiency of these documents during the judicial review process.

B. Appellant's Misstatements Of Fact

In his "Question Presented," appellant states that Superintendent Mooney took an "active adversary role as a party against his discharged employee." The challenged statute (W. Va. Code § 15-2-6) refers to the superintendent as a party and the proceedings were so styled, but the Superintendent did not sit at counsel table or otherwise assume the role of a party. He appeared as a witness to explain the discharge procedure (as did others), but otherwise did not function as the "accuser" or

"prosecutor," thus diminishing the impact of appellant's "command influence" theory. The Superintendent was the executive head of the agency, and thus had the sole responsibility to determine what action to take upon learning of the allegations against appellant. As executive head of the agency, he was a proforma party to all the proceedings to date, in his official capacity.

In an apparent effort to make the state's judicial review procedures appear unfair, appellant's current counsel represents that no oral argument was allowed in the Kanawha County Circuit Court nor was new evidence introduced. Both assertions are mistaken. Oral argument was rejected by the parties, and stipulated evidence was introduced.

Appellant repeatedly asserts that he was denied a pre-discharge opportunity to respond. Though the record of his pre-discharge encounters with Lt. Fink and Superintendent Mooney is limited, it is apparent that appellant and his attorney elected not to respond in depth to the charges unless first given copies of the written statements secured by Lt. Fink. It has never been alleged that appellant's pre-discharge knowledge of the charges was inadequate to afford him a basis on which to respond, nor has there ever been any attempt to show that he was prevented from responding. Appellant complained below that Lt. Fink did not interrogate appellant, but there was no allegation or evidence that appellant was prevented from volunteering information. Appellant did volunteer to Lt. Fink, prior to

discharge that he "didn't know what you [Fink] are talking about." (Tr. 374-375)

Testimony regarding the pre-discharge conference with Superintendent Mooney does not disclose any attempt by appellant to present his side of the story, nor does it indicate he was prevented from doing so other than by his election not to do so without first seeing the written statements. (Because there was a pending criminal investigation of the theft of the radios, and because appellant appeared to be an accessory after-the-fact, disclosure of the statements might have compromised the state's ability to prosecute.)

Appellees vehemently deny that appellant was not permitted to urge the superintendent to invoke a lesser sanction than discharge. Though the

record is barren on this point, counsel is informed that much of the pre-discharge conference with the Superintendent was consumed by exactly such pleas, articulated by appellant's attorney. Under state law, it was appellant's burden to make a record sufficient to demonstrate error. Delong v. Kermit Lumber Co., 332 S.E.2d 256, 259 (W. Va. 1985). Having failed to do so, he cannot now rely on the absence of a record on this point.

HOW THE ISSUES WERE RAISED BELOW

Appellees concede that arguments b and c of the Jurisdictional Statement, alleging "inherent bias" in the Appeals Board procedure, were raised in the pleadings below as due process attacks on W. Va. Code § 15-2-6. (App. A; App. B, pp. 6-7, 11-13; App. D. pp. 5-6)

However, no evidence was introduced at any stage to demonstrate actual bias or prejudice on the part of any member of the Appeals Board, nor was there any attempt to show actual "command influence."

Argument "a," alleging the failure to afford a pre-discharge opportunity to respond, has never until now been articulated as an attack on the statute. Rather, appellant attacked the pre-discharge conduct of Lt. Fink and Superintendent Mooney, alleging that both were under a duty to (1) disclose the written statements, and (2) afford appellant a pre-discharge opportunity to respond to the statements. (App. B, pp. 3-6, 9-10; App. C, pp. 4, 6; App. D, pp. 2-4, 7-9) (General Order No. 10, an internal regulation, required disclosure of Lt. Fink's investigation. App. E,

App. Ex. No. 4) The pre-discharge procedures regarding dismissals are articulated in W. Va. Code § 15-2-21, which have never (even now) been substantially attacked by appellant.

No findings-of-fact have been rendered by any tribunal at any level regarding appellant's pre-discharge opportunity to respond. At the first level of judicial review, appellant was entitled to introduce new evidence to demonstrate that he was effectively denied a pre-discharge opportunity to respond. W. Va. Code § 29A-5-4. However, he elected not to.

ADDITIONAL PERTINENT STATUTES

> "§15-2-21. Suspension, demotion or discharge of members; right of appeal.
>
> "The superintendent may suspend, demote in rank or discharge from the service any member of the department of

public safety for any of the following causes: Refusing to obey the lawful orders of his superior officer, neglect of duty, drunkenness, immorality, inefficiency, abuse of his authority, interference with the lawful right of any person, participation in political activities, primaries, conventions or elections, conviction for a crime or any action proscribed under this article. The superintendent shall cause an investigation to be made when notice of any one or more of such causes is brought to his attention and shall determine whether or not the member should be suspended, demoted in rank or discharged. If the superintendent orders the member suspended, demoted in rank or discharged, a written statement of the charges and a written order of suspension, demotion in rank or discharge shall be delivered personally to the member by his commanding officer, or next in command in the absence of his commanding officer. The superintendent shall explicitly set forth in any such written statement of charges the details giving rise to the discharge. The member may appeal the superintendent's order to the board of appeals created for such purpose or to

the circuit court of Kanawha county in accordance with the provisions of section six [§ 15-2-6] of this article and all of the original papers in such cases shall be delivered to the appeals board or the circuit court, as the case may be.

"The right to appeal a suspension or discharge shall not apply to members until they have completed their probationary period with the department, which shall be for a period of eighteen months."

ARGUMENT

I.

THE FAILURE OF W. VA. CODE §15-2-6 TO MANDATE A PRE-DISCHARGE OPPORTUNITY TO RESPOND IS NOT FAIRLY BEFORE THIS COURT, DID NOT INJURE APPELLANT, AND RAISES AN INSUBSTANTIAL ISSUE.

A. Appellant Has Never Until Now Attacked The Statute on This Ground.

As articulated at pages 7 to 11 herein, appellant's attack on W. Va.

Code § 15-2-6 has, until now, been predicated on the alleged impartiality of the Appeals Board procedure. To be fair, it must be conceded that appellant has always asserted that due process required the Department of Public Safety to afford a pre-discharge opportunity to respond. However, it has never been asserted that any statute played a role in the alleged denial of this right. (Appendices A, B, C, and D are representative of appellant's attacks.) In order to be considered on appeal by this Court, the ground raised here as an attack on the statute must have been raised below. Lerner v. Casey, 357 U.S. 468 (1958); Coleman v. Miller, 307 U.S. 433 (1939). Thus, this Court has no jurisdiction of this issue under 28

U.S.C. § 1257(2). Though this Court has discretionary jurisdiction to hear this issue by treating the appeal as a certiorari proceeding, it should not do so for the reasons hereafter set forth.

B. The Statute, in That it Does Not Prohibit a Pre-Discharge Opportunity to Respond, Can Be Construed as Consistent With Due Process.

This Court presumes that state courts will construe a statute so as to uphold its constitutional validity. Douglas v. New York, N.H. and H.R. Co., 279 U.S. 377 (1929). In view of the fact that appellant received ample opportunity to respond prior to discharge, it is not at all clear that the lower court's ambiguous decision was premised on the failure of the statute to expressly mandate such an opportunity. (App. A to the Petition, page A-2)

C. The Record Below Requires the Conclusion that Appellant Received a Fair Opportunity to Respond Prior to Discharge.

The testimony regarding appellant's pre-discharge encounters with Lt. Fink and Superintendent Mooney was not well-developed. As summarized in the Statement of the Case, part A, herein, appellant met with the investigating officer three times and with the Superintendent once prior to discharge. The evidence against him was orally summarized for Taylor by Lt. Fink. Though the record does not reveal how much detail was given, the burden to make an adequate record rests on the appellant. Delong v. Kermit Lumber Co., 332 S.E.2d 256, 259 (W. Va. 1985). No evidence was offered which would show appellant to have been prohibited from volunteering a

defense to either Lt. Fink or the Superintendent.

Due to the futility of attacking administrative procedure before the body that employs them, W. Va. Code § 29A-5-4 provided appellant the opportunity to fully develop an evidentiary record on this issue before the Circuit Court of Kanawha County. He elected not to. (Appellees, by contrast, reserved the right to do so should the circuit court have found the existing record inadequate.)

D. This Issue is Inappropriate for Certiorari Jurisdiction.

There has been insufficient time for lower appellate courts to develop conflicting opinions regarding the applicability of Cleveland Board of Educ. v. Loudermill, ___ U.S. ___, ___

S. Ct. ___, 84 L. Ed. 2d 494 (1985), to police discharges. During the period between Arnett v. Kennedy, 416 U.S. 134 (1974) (this Court's last articulable standards regarding due process in public employment) and Cleveland, supra, appellate courts uniformly upheld discharges of permanent police officers in the face of due process attacks based on the unavailability of a pre-discharge opportunity to respond. Economico v. Village of Pelham, 50 N.Y.2d 120, 405 N.E.2d 694 (1980); Grant v. Police Commissioner of Boston, 387 N.E.2d 178 (Mass. 1979); Nicoletta v. North Jersey District Water Supply Commission, 390 A.2d 90 (N.J. 1978); City of New Brunswick v. Speights, 157 N. J. Super. 9, 384 A.2d 225 (1978); Gorham v. City of Kansas City, 225 Kan. 369, 590 P.2d 1051 (1979); Orr v. Civil Service Board

of City of Portland, 30 Or. App. 739, 567 P.2d 1076 (1977); Hoyt v. Police Commissioner of Baltimore City, 279 Md. 74, 367 A.2d 924 (1977).

The policy of these decisions, as applicable now as then, is that the public interest in expeditious removal of untrustworthy police officers, who wield the power of the state in its most volatile form, outweighed the individual's interest in cumbersome pre-discharge procedural rights.

This policy rationale may have to be reassessed in light of Cleveland, but such reassment should be permitted to develop in the lower courts, and in cases where the parties were cognizant of the significance of Cleveland throughout the proceedings. The record as it exists in this case is adequate to conclude that, had appellant wanted to

explain himself prior to discharge, h could have. No injustice will b wrought by refusing to hear his case.

II.

APPELLANT'S ASSERTION THAT THE APPEAL BOARD WAS "INHERENTLY BIASED" RAISES NO SUBSTANTIAL FEDERAL ISSUE.

Appellant contends that the boar of appeals was not an impartia tribunal. In support of this contentio he raises two areas of alleged "biasin influence": (1) Command Influence[1] an (2) pecuniary interest. Appellant

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[1] Appellant also characterizes "Comman Influence" as "judging one's own case. The two "biasing influences" are, i reality, one, since appellant argue that the adjudicative officers were th employees of the superintendent and tha this "makes it worse." Jurisdictiona Statement at 8-9.

insists that he is not alleging an impermissible combination of investigative and adjudicative functions. This is in apparent recognition of the lack of force such an argument would have before this Court. However, his arguments are, in fact, largely based on exactly such considerations.

The Supreme Court of the United States has several times upheld administrative procedures whereby property and liberty interests are adjudicated by the same body, and even the same persons, who investigated and brought the charges. Hortonville Joint School District v. Hortonville Educational Asso., 426 U.S. 482 (1976) (6-2 decision upholding the discharge of tenured public teachers when the post-discharge evidentiary hearing was held before the same school board that originally

discharged them); Withrow v. Larkin, 421 U.S. 35 (1975) (unanimous decision upholding a state statute creating a medical examining board that initiated, investigated, and served as tribunal in, license revocation proceedings); Richardson v. Perales, 402 U.S. 389 (1971) (upheld a system in which a social security examiner both developed facts and then made the disability decisions); Federal Trade Com. v. Cement Institute, 333 U.S. 683 (1948) (commission investigated the party defendants, testified before Congress that their pricing system was illegal, and subsequently served as the tribunal adjudicating the legality of the pricing system).

Thus, the fact that the Appeals Board consisted of members of the same department as others who initiated and

investigated the charges clearly does not disqualify them from hearing the issues. Indeed, one of their own member's future in the Department depended on their decision. They could not help but be mindful of the fact that one of them might someday be in Taylor's position before a similar board.

Appellant relies on decisions dealing with the personal interest of judges in the outcome of judicial proceedings. These cases are distinguishable due to the direct interests the judges had in the outcome, but they are totally inapposite because administrative due process is not judged by the same standards as judicial proceedings.

> "[P]rocedural due process in the administrative setting does not always require application of the judicial model. * * *" Dixon v. Love, 431 U.S. 105 (1977).

> "[A] separation of the prosecutorial and judicial functions is required in a court case but not in an administrative proceeding, Withrow v. Larkin, 421 U.S. 35 (1974). * * *" Main Road v. Aytch, 565 F.2d 54, 58 (3rd Cir. 1977).

Assuming that the judicial mode did apply, the alleged interest of th Board members in upholding thei superior's decision does not equate wit the direct personal interests creatin the impartial tribunals in Tumey v Ohio, 273 U.S. 510 (1927); Ward v Village of Monroeville, 409 U.S. 5 (1972), and Gibson v. Berryhill, 41 U.S. 564 (1973). (In the Hortonvill Joint School District, supra, 426 U. S at 491-493, the Court was not persuade that the personal stake of school boar members reviewing their own investiga tion and prior decision was comparable

to that in Tumey and the other cited cases.)

In this case the personal stake of the members of the board of appeals as alleged by appellant, is speculative and insubstantial. Appellant argues that the board members would uphold the superintendent's decision so that he would not fire them or would give them promotions. No evidence whatsoever was introduced at any level in state court to support this contention. This argument further ignores many safeguards in the system. Statutory and administrative safeguards may save an otherwise allegedly biased administrative procedure. Marshall v. Terrico, Inc., 446 U.S. 238 (1980).

The members of the board are chosen by lot and are of varying ranks. In addition. "no department member may

serve on an appeals board if he is a member of the same detachment as the member making the appeal." W. Va. Code § 15-2-6. Thus, initially, each board should be devoid of bias for or against either party. Nothing in the procedure requires the individual members of the appeals board to inform the superintendent of their votes on the appeal. Since the decision of the board is reached by majority vote, the superintendent need not know whether a particular member had voted to uphold or overrule the initial decision.

Moreover, with the exception of probationary employees, members of the Department of Public Safety can be removed only for cause, and have rights in their permanent rank. W. Va. Code § 15-2-4, W. Va. Code § 15-2-5; W. Va. Code § 15-2-6; W. Va. Code § 15-2-21.

Furthermore, suitability for promotion is established by a "promotion evaluation board." W. Va. Code § 15-2-9. Thus, the superintendent could not effectively act against an appeals board member out of mere displeasure over the result of the appeal. In light of the safeguards, the alleged "financial" concern of the members of the appeals board is contrived.

Finally, we must start from the presumption that the hearing officers are unbiased. Schweiker v. McClure, 456 U.S. 188, 195 (1982). A court cannot rely on generalized assumptions of possible interests placing special weight on the various connections of the hearing officers. Id. at 196. As pointed out by this Court in Schweiker, such connections would only be relevant if those under whom the officers are

connected, in this case the superintendent, themselves have a personal (as opposed to official) interest in the outcome. Id. Nothing in the record indicated that the superintendent was influenced by any personal bias or financial interest or that there was any connection between the appeals board's decision and the personal interests of the board members.

Appellant's contention that the members of the appeals board were the subjects of "Command Influence" is merely a restatement of petitioner's prior arguments, and should similarly fail. Again, no evidence was developed below to show actual command influence. While command influence is of some concern in judicial courts-martial proceedings, "procedural due process in the administrative setting does not

always require application of the judicial model." Dixon v. Love, 431 U.S. 105 (1977).

"Command influence" is a serious consideration in military criminal courts-martial, yet even in that setting, this Court has declined to interfere with composition of the tribunal:

> "Although the opinion in O'Callahan was not uncritical of the military system of justice, and stressed possible command influence and the lack of certain procedural safeguards, 395US, at 263-266, 23 L Ed 2d 291, the decision there, as has been pointed out above, certainly was not based on any conviction that the court-martial lacks fundamental integrity in its truth-determining process. Indeed, our subsequent ruling in Relford itself indicates our conclusion that military criminal proceedings are not basically unfair, for Relford clearly approves prosecution in a military court, of what is otherwise a civilian crime, when factors are present that

> establish the offense's 'service connection.'" Gosa v. Mayden, 413 U.S. 665, 680-681 (1973). See also, Reid v. Covert, 354 U.S. 1 (1957).

In administrative settings, appellate courts have uniformily rejected due process attacks based on the same type of command influence alleged here. In Main Road v. Aytch, 565 F.2d 54 (3rd Cit. 1977), the decisions of the Superintendent of Prisons were reviewed by a board consisting entirely of the director's subordinates. After acknowledging that the procedure "might have been better if the board had been constituted differently," the court went on to say:

> "Nevertheless, we cannot say that the composition of the special board inherently violates due process. What process is due depends upon the forum in which it is administered and the underlying circumstances.

Morrissey v. Brewer, 408 U.S. 471, 481, 92 S. Ct. 2593, 33 L.Ed.2d 484 (1972). What is unacceptable in a judicial setting may be tolerable in an administrative proceeding. * * *" Main Road v. Aytch, supra, 565 F.2d at 58.

Similar "command influence" was held not to violate due process in Jenkins v. Louisiana State Board of Education, 506 F.2d 992 (5th Cir. 1975):

> "We realize that the Board at the first hearing in this case made more than an initial investigation, actually imposing suspensions on appellants. We are also aware that the members of the Board were appointed by President Jones, one of the main witnesses against the students.
>
> "We are asked to infer that because the Board had already had one hearing and because its members were appointed by the college president (who had also employed many of them), the members must have been partial to the college's position. We have not been shown any evidence of bias or prejudice of the board members, and our own examination of the record

has not uncovered any. * * *"
(Emphasis added.)

The suspension was upheld.

The highest courts of at least three states have squarely held that police hearing boards, composed entirely of subordinates of the commanding officers whose disciplinary actions they reviewed, complied with the due process requirement of impartiality. Gorham v. City of Kansas City, 225 Kan. 369, 590 P.2d 1051 (1979); Hoyt v. Police Commissioner of Baltimore City, 279 Md. 74, 367 A.2d 924 (1977); and Kelly v. Sterr, 62 N.J. 105, 299 A.2d 390 (1973) cert. denied, 414 U.S. 822 (1974).

Police hearing boards are not held to the same standards as civilian or military criminal courts. Moreover, in this case, appellant has not shown a factual basis for his claims. The mere

fact that the board members were subordinates of the superintendent is insufficient to state a claim, particularly in light of their statutory right to keep their permanent ranks. Appellant has never attempted to demonstrate that any actual force was exerted upon the appeals board, nor has he ever alleged or demonstrated that its members acted in fear of the superintendent.

There are important policy reasons for permitting the Department of Public Safety to make its own personnel decisions. Police officers are an unusually powerful class of employees. Vested with the State's police power, their behavior is subject to high ethical and moral standards designed to insure fair and impartial deployment of their authority. Additionally, as important witnesses in most criminal proceedings,

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their on-duty and off-duty reputations for credibility, integrity, and law abidance are important to their effectiveness. Their training and experience make them uniquely aware of the necessity and feasibility of meeting these standards, and uniquely aware of the classes of behavior inappropriate to a police officer.

A hearing board composed of civilians would be unable to properly judge the severity of the charges in light of these standards. Conversely, they would be unable to properly judge excusable behavior engaged in under exigent or unusual circumstances.

Lastly, they are best able to judge the fairness and credibility of a pre-discharge investigation and the officer's assertions in his own defense.

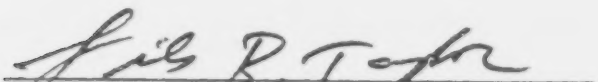
For these reasons, the Department is exempt from the State Civil Service System. For these reasons, administrative expertise within the Department deserves deference. For these reasons, the Appeals Board is constituted fairly.

CONCLUSION

The issue of appellant's pre-discharge opportunity to respond is not appropriate for this Court's appellate jurisdiction, and was inadequately developed below to justify certiorari. The alleged impartiality of the Appeals Board arises from circumstances which this Court and other courts have uniformly held to be consistent with due process, and thus, raises no substantial federal question.

Respectfully submitted,

CHARLES G. BROWN
ATTORNEY GENERAL



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APPENDIX A

(Excerpts from pages 34-38 of the transcript of proceedings before the Appeals Board)

I want it understood that I have an obligation to raise objections on behalf of my client harkening to one of the questions I would have asked you, I would want you to understand that my role is that of an advocate. I mean nothing personal in anything I say in connection with the raising and offering of these motions. It is, nevertheless, my responsibility and I hope you will understand that.

I object to this hearing that has been scheduled to commence today for the reason that I think it is violative of the due process guarantees of State and Federal Constitutions and that it represents in my judgment an abuse of

discretion in failing to grant a continuance.

* * *

Finally, it is my position that the statute which gives you power which gave birth to this Board is void ad nauseam, void on its fact and I object to this hearing for that reason and more specifically for the following reasons:

There is no provision in Chapter 15, Article 2, Section 6 for suitable discovery in lieu of the Administrative Procedures Act. I invite your attention to it, read it if you will. There is no suitable discovery in lieu of the Administrative Procedures Act. I am denied those things that I have just mentioned to you and accordingly the interest of my client, Mr. Taylor, is prejudiced.

Secondly, I shall not use the term "handpicked" because it so offends. I shall say to you that 15-2-6 gives the Superintendent, who is my client's adversary in this proceeding, the power to select by whatever means, by lot, whatever. In this case by lot, but it gives our adversary the power to select the men who will sit in judgment on his order.

Gentlemen, I mean absolutely no disrespect to you or any of you as I say that, but as a theoretical proposition, as a legal proposition, it is my judgment that it violates the due process guarantees of the State and Federal Constitution. It is my judgment that any man who sits in judgment on another should not ever have to consider anything but the burden or proof. It is my view that as members of the Department

of Public Safety, whose service my client used to serve at the will and pleasure of the Superintendent, but finally in a theoretical sense that as I would suggest to you in a very real sense you are under somewhat of a disability and in that respect I suggest to you that my client is prejudiced.

Finally, just to address myself to the Constitutional question. I have suggested in my applications for injunctive relief that there was the possibility of constitutional jeopardy. I have suggested to you that by proceeding under this very statute that gives you birth, there are constitutional infirmities and I had suggested that due process requires independent judgment, an opportunity to discover your opposition and I say that keeping in mind that we're dealing with a man who is a member

of that Department of Public Safety for 17 years who as I think your records will sufficiently reflect was summarily discharged on January the 16th.

* * *

APPENDIX B

EXCERPTS FROM "SUBSTITUTED PETITION FOR APPEAL FROM ORDER OF ADMINISTRATIVE TRIBUNAL" IN THE CIRCUIT COURT OF KANAWHA COUNTY

This is an appeal authorized under Chapter 15, Article 2, Section 6 (§15-2-6) of the West Virginia Code, from an order of the Board of Appeals of the Department of Public Safety convened by special order of the Superintendent of the Department of Public Safety under §15-2-6, West Virginia Code. Said order of the Board of Appeals was dated April 14, 1980. It sustained appellee H. F. Mooney's order discharging appellant Robert Julian Taylor from the Department of Public Safety. This appeal was filed on June 12, 1980 and an order entered on June 12, 1980, by Circuit Court Judge Andrew McQueen, granting such leave to appeal.

* * *

FACTUAL BASIS OF CASE ON APPEAL

1. Taylor, a resident of 2201 Lincoln Avenue, Parkersburg, West Virginia, was a member of the Department of Public Safety from April 1, 1962, until discharge on January 16, 1979. He held the rank of Corporal and was the Detachment Commander of the Paden City Detachment located in Tyler County, West Virginia, from February 1, 1976, until the date of his discharge.

2. The Defendant Mooney is and was at all times pertinent, the Superintendent of the Department of Public Safety holding, by statute (§15-2-2, West Virginia Code), the rank of colonel. Acting on information, the nature of which was not made known to Taylor, Defendant Mooney, on January 11,

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1979, by something called "Special Order No. 7", ordered one of his subordinates, a Lt. R. S. Fink of the Department of Public Safety to investigate certain allegations against Taylor of wrongdoing in his official conduct.

3. Lt. R. S. Fink, acting as defendant Mooney's agent, investigated the allegations by taking four unsworn statements (one on January 13, 1979 and January 14, 1979, one from Edward Thomas Wasmer, Jr., on January 13, 1979), each statement representing a series of responses to leading and highly suggestive questions posed by Fink; by reading one unsworn narrative statement by said Grove made on January 10, 1979; and by assuming Taylor should have known of a routine departmental teletype reporting a suspected larceny of four radios.

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4. Said Lt. Fink, during the course of his investigation met with Taylor on three occasions and generally told Taylor, but not in detail, that he, Taylor, was under investigation. On none of the three occasions was Taylor permitted to see or given an opportunity to read the statements Fink had collected. On none of the three occasions was Taylor given the opportunity to respond to the accusations or innuendo within the purview of Department of Public Safety General Order #10, "Internal Investigations", Paragraph 11, and at no time were Taylor's rights under said Order #10, Paragraph 11, read to him or otherwise made known to him. On none of the three occasions was Taylor otherwise given a fair opportunity to respond to the accusations or innuendo. On the third of the three

occasions, on January 15, 1979, Taylor specifically asked Fink to see the statements Fink had collected, and Fink consulted immediately with defendant Mooney by telephone, by which telephone conversation defendant Mooney ordered Fink not to allow Taylor to see the statements he had collected. Further, defendant Mooney ordered Fink to order Taylor to be in Mooney's office in Charleston, West Virginia, the next morning, January 16, 1979, but Taylor was not told for what purpose.

5. On January 16, 1979, Taylor appeared with his attorney in Defendant Mooney's office. At that meeting without giving Taylor or his attorney an opportunity to respond to the accusations or innuendo against Taylor or otherwise to know the evidence on which defendant Mooney's inference of Taylor's

misconduct was based or otherwise to explain, and in spite of numerous requests for such opporutnity made by Taylor and his attorney, defendant Mooney personally signed and served upon Taylor a written instrument called Special Order #10, an instrument prepared in advance of the meeting, and an accompanying letter, addressed to Taylor, also prepared in advance. Special Order #10 discharged Taylor from the Department of Public Safety forthwith. The letter accompanying the discharge order gave no reasons for the discharge the violation of six (6) numbered sectios of General Order Number 9 of the Department of Public Safety.

* * *

6. Taylor filed an appeal of such order of discharge as was authorized by §15-3-6, of the West Virginia Code.

Such appeal is to an ad hoc Board of Appeals picked by lot from defendant Mooney's subordinates in the Department of Public Safety.

7. Such Board of Appeals is mandated by §15-2-6, to have no member of Taylor's rank among its seven members. Such Board of Appeals is to have one member each from the other seven ranks of trooper through captain, and the Board of Appeals actually picked was composed of persons holding the following ranks: captain, lieutenant, master sergeant, first sergeant, sergeant, trooper first class, and trooper. Each of these ranks is in the chain of command of the Department of Public Safety headed by the Superintendent, defendant Mooney, who holds the rank of colonel.

* * *

11. A hearing was held from March 15, 1979 to March 20, 1979, at the West Virginia State Police Academy, Institute, West Virginia, before the ad hoc Board composed of seven subordinates of defendant Mooney (designated as "Appellee," in the hearing record), who, according to §15-3-7, West Virginia Code, unnumbered paragraph five, had the burden of proof, who was represented by counsel from the Attorney General's Office, and who was otherwise throughout the hearing treated as a party in the litigation sense. At all times during the hearing, the hearing was treated as an adversing process between Taylor, designated as appellant, on one side, and defendant Mooney, designated as appellee, on the other side.

LEGAL BASIS OF THE CASE ON APPEAL

A. Respondent's acts, above set forth, deprived Taylor of property and ilberty without due process of law in violation of both the West Virginia constitution Article 3, §10 and the Fourteenth Amendment of the United States Constitution in the following particulars:

1. Taylor was deprived of notice and an opportunity to be heard before discharge;

2. Taylor was deprived of right to have a neutral official make the prehearing inference of probable cause for discharge because --

a) the investigating officer (Lt. Fink) on the scene cannot be and was not here neutral.

b) the official making the prehearing decision, defendant Mooney,

was not neutral in that he initiated the investigation on certain information and he personally controlled the investigation during its course, and

c) it was not based on first hand knowledge or statements under oath;

3. The rules or standards Taylor was alleged to violated were too vague to give adequate notice of what was an acceptable standard of conduct or to allow him to prepare his defense once the rules were alleged to be violated;

4. Taylor was not given adequate time to prepare his defense, nor allowed neutral discovery or compulsory process to present his own evidence;

5. No stay of the discharge was granted pending the appeal;

6. The Board was an inherently biased hearing tribunal because it was composed entirely of subordinates of one of the parties, defendant Mooney, which party had the burden of proof (although called appellee) and although the actual selection was by lot from a pool of all of defendant Mooney's subordinates, each of the seven members of the Board was formally ordered to his task as a hearing officer by one of the parties to the hearing, who also had the sole authority to relieve each and/or any of them at their own request, for cause. The inherent bias of an administrative hearing board composed entirely of subordinates of one of the contesting parties is compounded where the subordination is in the context of a military type organization replete with "chain of

command", efficiency reports and strict hierarchical protocol.

7. The inherent bias of the subordinate hearing board was exacerbated by the Board's refusal to allow any inquiry of its membership to ascertain the possible existence of individual bias.

8. The interent bias of the subordinate hearing Board was further exacerbated and its inadequacy further compounded by the Board's refusal to have present at the hearing an independent legal advisor, and still further the remote legal advisor that was available was from the same legal office (the Attorney General's Office) as the attorney for one of the parties, and further, even still, such remote legal advisor was then not consulted on

difficult legal matters or when Taylor so requested.

9. The Board had available to it and consulted evidence not admitted at the hearing.

10. The Board allowed evidence to be received at the hearing that was unsworn and uncross-examined.

11. The Board used a standard for making its decision entirely inappropriate to a trial hearing and fundamentally unfair; that standard is "sufficiency of the evidence to sustain", a standard that is analogous to, but even weaker than the substantial evidence rule, a standard appropriate only to the review on the record of a decision made by someone else, and a standard that essentially allows the decision maker to ignore the substantial evidence on the other side, the side not

prevailing below, here, the already, at the time of the hearing, discharged Taylor. The trial standard of preponderance of the evidence that § 15-2-6, West Virginia Code may imply as required would at least force the decision maker to weigh the conflicting evidence, but where, as here, a decision defames as well as cuts off employment of long and unblemished duration, fundamental fairness demands at least the higher equity standard of proof, i.e. clear and convincing evidence.

B. Without regard to the numerous deprivations of procedural due process listed in A, above, the Record made before the Board of Appeals does not contain substantial evidence when viewed as a whole to support the Board's findings.

* * *

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PRAYER FOR RELIEF

The following additional questions are raised on this appeal:

a) order that Taylor be immediately reinstated in the Department of Public Safety at his former rank of corporal with full payment of any compensation withheld and with full credit for service between the date defendant Mooney issued his discharge order to the date of reinstatement;

b) order the payment by the Department of Public Safety of the full cost to Taylor of protecting his constitutional rights, including all hearing and litigation costs and reasonable attorney's fees; and

c) grant him such other relief as is appropriate.

ROBERT JULIAN TAYLOR

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:hael S. Francis
:NNAN & FRANCIS
O. Drawer 68
Martinsville,
Vest Virginia 26155

ies A. McLaughlin,
counsel

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APPENDIX C

IN THE CIRCUIT COURT OF KANAWHA COUNTY
WEST VIRGINIA

ROBERT JULIAN TAYLOR,

Plaintiff & Appellant,

vs. CIVIL ACTION NO. AP-CA-80-78

H. F. MOONEY, JR., individually, and as Superintendent of the West Virginia Department of Public Safety and THE DEPARTMENT OF PUBLIC SAFETY BOARD OF APPEALS for the discharge of Robert Julian Taylor,

Defendants & Appellees.

APPELLANT'S PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

In accordance with this court's authority under ¶15-2-7, W.Va. Code, to "determine all questions submitted to it on appeal" and since, according to the State Administerative Procedures Act, §29A-5-4(9), W.Va. Code, such questions may include whether "the substantial rights of the petitioner ... have been

prejudiced because the administrative findings, inferences, conclusions, decision or order are: (1) in violation of constitutional ... provisions; or ... (3) made upon unlawful procedures; or ... (5) clearly wrong in view of the reliable, probative and substantial evidence on the whole record ...," this court makes the following findings of fact and conclusions of law (see Harrison v. Ginsberg, 286 S.E.2d 276 (W.Va. 1982), both as to whether constitutionally mandated procedures were followed and as to whether the Appeal Board's order was clearly wrong in view of the reliable, probative and substantial evidence on the whole record:

Findings of Fact

1. The Board of Appeals selected under § 15-2-7, W.Va. Code, by the

superintendent of the Department of Public Safety, who was an active, not nominal, party at the discharge hearing, would have, no matter who the individuals actually selected might be, and have an inherent bias in favor of the party who was their employer, and commander-in-chief and against the party who was no longer their peer but now a civilian outsider. Such inherent bias is inferred both from the natural perception of a pecuniary interest each member of the board would have in maintaining his position and gaining promotion within the department and from the naturally strong influence a commander has over his subordinates in a military type organization, which the Department of Public Safety is.

2. The inherent bias of the board was exacerbated by the board's not

allowing individual voir dire of the members of the board of appeals and, by the fact that no neutral legal officer was available to aid the board.

3. Appellant was not afforded a meaningful opportunity to respond to the charges against him prior to his discharge on January 16, 1979.

4. The entire case against appellant was based on the testimony of witness Grove, who, because of prior statements wholly inconsistent with the incriminating aspects of that testimony, and who otherwise was of dubious credibility, was not a reliable witness, and therefore the testimony of witness Groves was either reliable, probative nor substantial.

5. There was no other evidence on the record from which it could be reasonably inferred that appellant

either knew or should have known that the radios he was charged with having guilty knowledge of, as the sole basis of his discharge, were stolen radios.

(Alternate) 5. Other than the unreliable Grove testimony, the record contains no evidence whatever to support the charges on which appellant's discharge was predicated.

Conclusions of Law

Based on the above findings of fact and on the law of the United States and of the State of West Virginia, this court reaches the following conclusions of law (with the particular findings and law supporting each conclusion cited therein):

1. The Board of Appeals convened to hear the appeal by appellant, Robert Julian Taylor, of his summary discharge as a non-probationary member of the

Department of Public Safety (a position in which appellant has a property interest) was not an unbiased and an impartial tribunal; therefore, the hearing and decision of the board were in violation of appellant's substantial rights to due process of law as guaranteed by the Fourteenth Amendment to the United States Constitution and Article III, Section 10 of the Constitution of West Virginia. (Findings of Fact 1 and 2 and State ex rel. Ellis v. Kelly, 145 W.Va. 70, 74-76, 112 S.E. 2d 641, 644-45 (1960) and Syllabus Points 2 and 3 thereof.)

2.Appellant was denied a meaningful opportunity prior to discharge to respond to allegations or charges against him in violation of his right to due process of law guaranteed by the Fourteenth Amendment to the United

States Constitution and Article III, Section 10 of the Constitution of West Virginia. (Findings of Fact 3 and Mackey v. Montrym, U.S. 99 S.Ct. 2612, 2619 (1979); Waite v. Civil Service Comm., 241 S.E.2d 164 (W.Va. 1978); c.f. Bone v. West Virginia Department of Corrections, 255 S.E.2d 919 (W.Va. 1979).

3. Appellant was denied a full evidentiary hearing prior to his discharge from his permanent rank and position in the Department of Public Safety in violation of rights guaranteed by Article III, section 10 of the Constitution of West Virginia. (Findings of Fact 3 and Yanero v. Fox, 2565 S.E. 2d 751 (W.Va. 1979); North v. West Virginia Board of Regents, 233 S.E.2d 411, 413 (and Syllabus Point #3) (W.Va. 1977).

4. Based on any one or all of the preceding three conclusions of law, the court further concludes that appellant's discharge was in violation of his right to due process of law and any such discharge is a mullity.

5. Based on the reliable, probative and substantial evidence in the whole record, the decision of the Board of Appeals to affirm the discharge of appellant Taylor was clearly wrong. (Findings of Fact 4 and 5 and § 29A-5-4(g)(5), W.Va. Code.)

WHEREFORE, the order of the Board of Appeals affirming the order of the superintendent of the Department of Public Safety discharging appellant Robert Julian Taylor on January 16, 1979 from his permanent position in the Department of Public Safety is hereby reversed, and the present superintendent

of the Department of Public Safety is ordered to return the petition to his status prior to January 16, 1979, as corporal of the uniformed service with full paymkent of the compensation that would have been due him from the date the superintendent issued his order dismissing appellant to the present date, and with full credit for service between the said dismissal date and the present date. It is further ordered that the superintendent pay petitioner such sum of money equal to the reasonable attorney fees actually paid and that were necessary to protect his legal interests.

_____

Judge of said Court

APPENDIX D

(Excerpts from Petition for Appeal to Supreme Court of Appeals of West Virginia)

II. Statement of Facts.

In 1979, Petitioner R. J. Taylor was a corporal in the state police with nearly seventeen (17) Years of "unblemished service." (Superintendent Mooney's testimony, Transcript of Board Hearing p. 95 (Tr. 95).) He was the Paden City detachment commander. On January 15, 1979, he was told by a higher ranking state police officer, Lt. R. S. Fink, to be in Superintendent Mooney's office in Charleston the next morning, January 16, 1979. Fink told Taylor to bring his lawyer. Fink did not give Taylor any written notice of

charges against him and did not, at that time, otherwise inform him of any specific charges against him and did not tell him what was the purpose of his going to Charleston. Fink had told Taylor two (2) days before (January 13, 1979) that Taylor was under investigation, that the investigation concerned Taylor's possible knowledge of, and complicity in, the theft of several walkie-talkie radios, and that he, Fink, had taken several statements that implicated Taylor. (Tr. 374) He did not give a copy of the statements to Taylor or allow him to read the statements or read the statements to him either then or at any time prior to Taylor's meeting with Superintendent Mooney on January 16, 1979. (Tr. 349) In fact, when Taylor specifically requested to see the statements at a

meeting with Fink on the evening of January 15, 1979, Fink called Superintendent Mooney for instructions and got the following instructions:

> "The General advised me that I should not let Corporal Taylor read those statements and, further, that I should cause Corporal Taylor to be in Department Headquarters the ollowing day at noon. (Tr. 349) (See also Mooney's testimony, Tr. 65)

On January 16, 1979, Mooney, in the presence of his first assistant, Lt. Col. Beverly, and his specially assigned assistant attorney general, met with Taylor and his attorney in Mooney's office. Mooney had talked to Fink on the morning of the 15th prior to meeting with Taylor. Mooney later reported: "There was never a doubt in my mind from

the time that Fink talked to me on the morning of the 15th that Taylor was guilty as charged." (Tr. 97) At the meetig on the 16th, Mooney offered to allow Taylor to resign in lieu of discharge. Taylor refused, protested his innocence, and was handed Special Order No. 10 discharging him from the Department forwith. (Tr. 66) Lt. Col. Beverly later testified to the same effect as the statement by Mooney quoted above: the decision to discharge Taylor was made prior to the meeting with Taylor and his attorney. (Tr. 112, 113) Taylor was not allowed to see the evidence against him at that meeting or to answer it. (Tr. 541)

* * *

III. Assignments of Error.

A. The Circuit Court erred in finding the process used for firing to be constitutional under Both Article III, §10 of the West Virginia Constitution and the Fourteenth Amendment of United States Constitution. In particular:

(1) The Departmental Appeals Board as constituted under § 15-2-6, W.Va. Code, was by its very make up not an impartial tribunal.

(2) The inherently biased-as-constituted board's impartiality was further unconstitutionally compromised by absolutely refusing to allow any voir dire of its membership and by having no independent legal officer to advise it.

(3) Under the procedures as outlined in §15-2-6 and as further

adumbrated by the Attorney General at the hearing the Board cannot reasonably be believed to have rendered a de nova judgment, but rather were reviewing the reasonableness of their commander's prior ex parte judgment, thus petitioner has had no meaningful evidentiary hearing at all.

B. Circuit Court erred in finding that there was substantial evidence to support the Appeals Board's decision since that decision was based entirely on testimony that was not credible as a matter of law.

IV. Points and authorities relied upon, discussion of the pertinent law, and the relief prayed for.

This part of the petition is divided into three parts: (A) Points and Authorities, (B)

Discussion, and (C) Prayer for Relief.

A. Points and Authorities

1. The Circuit Court erred in finding that the procedure used by the superintendent of the Department of Public Safety to discharge petitioner was constitutional. In particular, the procedure used was unconstitutional because:

(a) Petitioner was discharged prior to having any fair opportunity to respond to the charges. This violates both the Federal and State constitutions. The principal cases from this Court that petitioner relies on in support of his claim are Waite vs. Civil Service Comm., 241 S.E.2d 164 (W.Va. 1977); State ex rel. Yanero vs. Fox, 256 S.E.2d 751 (W.Va. 1979). The principal federal cases are Mackey vs. Montrym,

443 U.S. 1, 99 S.Ct. 2612 (1979); and Barry vs. Barchi, 443 U.S. 55, 99 S.Ct. 2642 (1970). Because a police officer is especially important to the protection of the public, he can be suspended or even discharged for gross misconduct where the facts are personally known to his superiors (as where he repeatedly refuses to obey a direct lawful order.) Bone vs. West Va. Department of Corrections, 255 S.E. 2d 919 (W.Va. 1979). Here, even if what Taylor was accused of doing could be characterized as "gross" (a dubious proposition) nonetheless the facts were not personally known to any supervisor or anyone else in the department in the way that obviated the absolute necessity of a prior hearing in Bone. As an umpire needs no hearing because he sees the ball and strikes so a supervisor needs no hearing when he

sees the gross misconduct. Insofar as State ex rel. Gooden vs. Bonar, 155 W.Va. 202, 183 S.E.2d 697 (1971) holds that no procedure is constitutionally necessary prior to the discharge of a state police officer it should be overruled as obsolete in light of later decision by this Court and the United States Supreme Court.

(b) The hearing that was afforded petitioner after he was discharged was before an ad hoc body of seven subordinates of the discharging officer who was also (1) the convening authority of the panel, (2) an official, active and testifying party at the hearing where he was represented by the Attorney General, who put on the "Superintendent's case." Moreover this party, officially the "appellee" (but with the burden of proof), had authority to

promote, transfer, suspend and discharge, ostensibly without hearing (as the very case before them illustrated) each member of this panel reviewing his discharge order and even had the authority to demote at his will and pleasure the officer who presided at the hearing. §15-2-4, W.Va. Code. Furthermore, this ad hoc panel had no formal legal training, no formal or informal training as hearing officers and had as their legal advisor (but not present) the Attorney General. Thus the Attorney General and his staff both represented one of the parties to the hearing and advised the hearing panel on legal issues. Finally the hearing panel refused petitioner's request to voir dire the panel individually or collectively before the hearing commenced. Petitioner relies chiefly on State ex

rel Ellis vs. Kelly, 145 W.Va. 70, 112 S.E.2d 641 (1960), a case directly on point but not cited by the Attorney General or the Circuit Court below. Nor were any of the other West Virginia cases that petitioner relies on cited by the Attorney General: Moats vs. Janco, 154 W.Va. 887, 180 S.E.2d 74, (1971) Osborn vs. Chinn, 146 W.Va. 610, 1212 S.E.2d 610 (1961), Williams vs. Brannen, 116 W.Va. 1, 178 S.E. 67 (1935), and City of Grafton vs. Holt, Judge, 58 W.Va. 182, 52 S.E.21 (1905).

The federal cases relief on are Gibson vs. Barryhill, 411 U.S. 564 (1973), Ward vs Village of Monroeville, 409 U.S. 57 (1972); Tumer vs. Ohio, 273 U.S. 510 (1927).

By way of contract, what this case is not, it is not petitioner's

contention that we have here an impermissible combination of investigative and adjudicative functions. Had the superintendent investigated the case, found probable cause (sufficient even to suspend) and then himself tried the ultimate fact, we would have a much weaker case. Withrow vs. Larkin, 421 U.S. 35 (1975).

(c) The inherent bias of th hearing panel as constituted was further exacerbated by the panel's confusion as to its role: Was it making a decision de novo, or merely reviewing the decision of its superior? Petitioner here relies on all the cases mandating procedural due process in the discharge setting. Somewhere along the way, petitioner was at least entitled to one full de novo hearing. Petitioner

received only the form of a de novo hearing, but not its substance.

2. There was not substantial reliable evidence to support the discharge. The one witness with knowledge of the case made two written predischarge statements containing no evidence from which it could reasonably be inferred that petitioner had the guilty knowledge for which he was fired. This witness, at the hearing, contradicted that prior statement, took the Fifth Amendment on one question, and refused to answer and was not forced to answer as to possible "deals" he had made with the Department of Public Safety or the Attorney General.

APPENDIX E

(Excerpts from Exhibits Before the Board of Appeals)

DEPARTMENT OF PUBLIC SAFETY
(WEST VIRGINIA STATE POLICE)
725 Jefferson Road
Charleston, West Virginia 25309

January 16, 1979

SPECIAL ORDER)
)
NUMBER 10)

1. The following named member of the Department of Public Safety is hereby discharged for cause from the Department of Public Safety. Letter dated January 16, 1979, sets forth cause and justification. Discharge is effective January 16, 1979.

CORPORAL R. J. TAYLOR

2. All clothing and equipment now in possession of Corporal Taylor will be turned over to his Commanding Officer for return to the Supply Office.

3. Corporal Taylor is entitled to a refund of deduction of salary on account of the Death, Disablity and Retirement Fund of the Department of Public Safety.

/s/ H. F. Mooney, Jr.
H. F. MOONEY, JR.
SUPERINTENDENT

EXHIBIT 2

OFFICIAL:
Lt. Colonel R. M. Hall
INSPECTOR

cc: Ltc. Beverley
Ltc. Hall
Maj. Donohoe
Companies A, B, C, D, E
Academy
Aviation
Bookkeeping

CIB/CIS
Crime Prevention
Governor's Security
Det. Commander

Communications
Graphic Arts
Legal Division

Member Affected
Personnel
Personnel File
Planning & Research
Printing
Supply

TR & SD
UCR
Dist. Sergeant

DEPARTMENT OF PUBLIC SAFETY
(West Virginia State Police)
725 Jefferson Road
South Charleston, West Virginia 25309

January 16, 1979

Corporal R. J. Taylor
West Virginia State Police
Paden City, West Virginia 26159

Dear Corporal Taylor:

On January 11, 1979, I received information regarding the theft of certain radio equipment and of your possible involvement in that theft. I caused an investigation of these allegations to be conducted and Lieutenant R. G. Fink was assigned as the investigating officer.

That investigation has been completed and substantiates that you have violated Paragraphs 1, 3(a), 3(c), 3(g), 5(b), and 9 of General Order Number 9, in that: You associated with Jerry Fulks, an employee of Mobay Chemical Corporation and that you and Jerry Fulks associated and consulted with James Groves regarding the use, adaptation and/or modification to employ as a communications system between yourself and others. This radio equipment and the battery charers, which you knew or had reasonable cause to believe to be stolen, contained certain designations and serial numbers which established it

EXHIBIT 3

as property of Mobay Chemical Corporation. The theft of property from Mobay was under investigation by this Department a State message listing the property with corresponding serial numbers had been issued by the Moundsville Detachment. Having such knowledge, you failed to take appropriate action regarding such stolen property and to perform the duties required of a member of the Department of Public Safety in a lawful and efficient manner.

For these reasons, I have by Special Order, this date, discharged you as a member of the Department of Public Safety.

Sincerely,

/s/ H. F. Mooney, Jr.
H. F. MOONEY, JR.
SUPERINTENDENT

HFM/EFW/pet

RULES OF CONDUCT

General Order Number 9

1. No member shall knowingly and intentionally violate the laws of the United States or the State of West Virginia.

2. No member shall refuse to obey a lawful order of his superior officer, irrespective of whether such superior officer shall be a commissioned officer, non-commissioned officer or member of the department senior to himself. Refusal to obey a lawful order means:

(a) To violate or fail to obey any lawful order or regulation;
(b) To fail to obey any lawful order or regulation of which the member has knowledge and which it is his duty to perform;
(c) To be derelict in the performance of any lawful order or regulation.

3. No member shall neglect the performance of his official duties. Neglect of duty means:

(a) The failure to perfrom an assigned or requiredI duty in a reasonably prompt, efficient and proper manner;

APPELLANT'S EXHIBIT 1

(b) To willfully feign illness or otherwise attempt to shirk his duty;

(c) To willfully refuse to perform any police duty that comes to the attention of a member;

(d) To perform principal and substantial duties in such a manner as to constitute gross inefficiency;

(e) To be absent from duties without proper authority;

(f) To neglect to give full attention to duties by accepting employment with any person, firm, partnership or corporation under any circumstances;

(g) To fail, refuse or be derelict in complying with all general orders, special orders, department memoranda and notices, and regulations contained in the staff or field operations manual.

4. No member shall drink intoxicating liquor or beer while in uniform. Alcoholism constitutes sufficient grounds for discharge from the service.

5. No. member shall abuse the authority vested in him by law, order or regulation. Abuse of authority means:

(a) Failure to deal with the public in a courteous, kind, patient and respectful manner;

(b) Failure to discharge official duties in an impartial manner;

(c) Knowingly and willfully disclosing confidential business of the department to individuals not authorized to receive such information;

(d) Signing, with intent to deceive, any false record, return, regulation order, or other official document, knowing it to be false;

(e) Knowingly making any other false official statement.

6. No member shall participate in political activities, primaries, conventions or elections. Participation means:

(a) Filing as a candidate for office in any federal, state or municipal primary or general election;

(b) Serving as a leader or officer of any political organization or representative or delegate to any political party convention;

(c) Holding any public office other than the office of a member of the department;

(d) Making speeches for a political organization or candidate or publicly endorsing a candidate for public office;

(e) Serving as an officer or member of any committee, group or organization having as its purpose the election, nomination or defeat of any candidate for federal, state or municipal office or any referendum or constitutional amendment;

(f) Soliciting funds in behalf of any candidate, political party committee or political organization.

Nothing in this order shall be construed to restrain a member from the unfettered exercise of his right of franchise or his privilege of tendering personal financial support of political candidates or issues.

7. No member shall carry any weapon or enforcement equipment in the discharge of his official duties, the use of which is not authorized by general order.

8. No member shall convert property of the state of west Virginia through a negligent or willful act. Convert means:

(a) to seel or otherwise dispose of;
(b) To willfully or negligently damage, destroy or lose;
(c) To suffer to be lost, damaged, destroyed, sold or wrongfully dispose of.

9. No member shall conduct himself in a manner unbecoming a member of the Department.

10. No member shall strike or draw or lift up any weapon or offer any violence against a member of the Department.

11. No member shall accept, or agree to accept, directly or indirectly, any bribe, gift, token gratuity, thing of value or pecuniary benefit to perform or refrain from performing any official act.

INTERNAL INVESTIGATIONS

GENERAL ORDER NUMBER 10

1. Upon receiving a complaint from any citizen or member of the Department of a violation of the law or a violation of a Department regulation on the part of any member, the person reciving the complaint shall advise the Superintendent, through channels, and notify the Inspector, forwarding such information as may be available.

2. All complaints must be reduced to writing and signed by the person who has brought the matter to the attention of the Department. Complaints, which appear justified and are received by telephone, shall be pursued only when the complaining party provides his full name, address and telephone number.

3. The Inspector shall notify the member or members adversely affected by the complaint, the immediate supervisor and the appropriate commanding officer of the nature of the complaint. Where dishonesty of a member is suspected, the Inspector shall determine when the member affected is to be advised.

4. If the complaint sets forth allegations which, on their face, constitute a minor violation of Department regulations or the laws of the State of West Virginia, the Inspector shall require the member or members

affected to submit a written explanation of the facts bearing upon the allegations contained in the complaint within five days.

5. Upon receipt of the written explanation regarding the complaint, the Inspectro shall, if the complaint is founded, issue, in the name of the Suprintendent, a written or oral reprimand or take such other appropriate action as he may deem necessary, including a recommendation to the Superintendent that disciplinary action be taken pursuant to West Virginia Code, 1931, 15-2-21, as amended, or a formal investigation be ordered. If the complaint is unfounded, the Inspector shall designate on the complaint that no further action is required. In each case, the inspector shall notify, in writing, the member or members affected, the immediate staff supervisor or the appropriate commanding officer and the Superintendent of his findings.

6. If a complaint sets forth allegations which, on the face, constitute a serious violation of Department regulations or laws of the State of West Virginia, the Superintendent shall direct that a formal investigation be conducted. He shall assign, by special order, a member of equal or greater rank than the member or members affected to investigate the allegations of the complaint; but in no event shall a member assigned to investigate a complaint be from the same company or division as the member or members

investigated, nor shall the investigator be of less rank than sergeant.

7. Upon completion of the investigation, the investigating officer shall submit a report to the Inspector setting forth a narration of the incident upon which the complaint is based, his findings of fact and evidence in support of such findings and his conclusions regarding the results of the investigation. The Inspector shall forward a copy of the report to the member or members affected and to the immediate staff supervisor or appropriate commanding officer.

8. Upon receipt of the investigation report, the Inspector shall forward it to the Superintendent together with his recommendation for properly disposing of the complaint. If the complaint is justified, the Inspector shall recommend that disciplinary action be taken or that charges be filed against such member or members. If the complaint is unfounded, the investigating officer shall recommend the investigation be discontinued and the case closed.

9. The Inspector shall notify the member or members affected, the immediate staff supervisor or the appropriate commanding officer that either the case has been closed or that disciplinary action has been recommended to the Superintendent.

10. When a complaint has been determined justified, a copy of the

investigation report shall become a permanent part of the respective member's personnel file. In those cases where the complaint is determined to be unfounded, the investigation report shall be placed in the Inspector's internal investigation file. No other copies will be retained or filed. The Inspector's internal investigation file, as well as the member's personnel file, shall be confidential and can be disseminated only at the direction of the Superintendent or of the member investigated. This order shall not be construed to prohibit access to individual personnel files by authorized members and employees of the Department of Public Safety.

11. During any investigation conducted pursuant to the provisions of this General Order, whenever there is a likelihood that criminal charges may result from the investigation, the following warnings shall be given the member or members affected prior to the commencement of the interrogation:

> "I wish to advise you that you are being questioned as part of a formal investigation of the Department of Public Safety. You will be asked questions specifically directed and narrowly related to the performance of your official duties. You are entitled to all the rights and privileges guaranteed by the laws of the State of West Virginia, the Constitution of West Virginia or the Constitution of the United States,

including the right not to be compelled to incriminate yourself and the right to have legal counsel present at each and every stage of this investigation."

"If you do answer, neither your statements nor any information or evidence which is gained by reason of such statements can be used against you in any criminal proceedings. However, these statements may be used against you in relation to Department charges."

12. It shall be a violation of this General Order to obstruct, hinder or impede internal investigations or hearing procedures or to knowingly conceal or misrepresent material facts relating to the subject matter of the inquiry or to fail to fulfill any of the above described duties and responsibilities.

FILED IN THE OFFICE OF
SECRETARY OF STATE OF
WEST VIRGINIA

THIS DATE_____